Supreme Court of the United Stat

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

FRANK BORDA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Frank Borda, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on January 4, 1961.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported. It is set forth in the Appendix to this Petition, *infra*, pages 1a-6a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 4, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

STATEMENT OF THE CASE

An indictment in the Trial Court for the Western District of South Carolina charged Petitioner, Frank Borda, with violation of Sec. 2312, Title 18, U.S.C. "Transportation of Stolen Vehicles".

Upon his plea of "Not Guilty" on October 7, 1958, the Petitioner was tried before a jury on May 4, 1960. At the conclusion of the evidence for the prosecution, the Petitioner moved for Judgment of Acquittal upon the grounds of failure to prove material allegations of the indictment. (Rec. Vol. II, P. 90.) The Court overruled the Petitioner's Motion. (Rec. Vol. II, P. 91).

The trial then proceeded and Petitioner introduced one Exhibit the entry of a plea of "Guilty" on behalf of Allen Frank Kayfield, after which the defense and prosecution rested.

At the conclusion of all of the evidence Petitioner renewed his Motion for Judgment of Acquittal upon the grounds of failure to prove the material allegations of the indictment. (Rec. Vol. II, P. 93). The case was submitted to the jury and on May 4, 1960, a Verdict of "Guilty as Charged" was returned.

On May 9, 1960, and within the time allowed by the Rules, Petitioner served a written "Renewal of Motion for Judgment of Acquittal and, in the Alternative,

Motion for New Trial", as will more fully appear by reference to the same which is printed in the Appendix attached hereto.

On June 24, 1960, this Motion came on for hearing before the Trial Court and both Motions were overruled. (Rec. Vol. II, Pages 119-144.) Judgment of Conviction was entered and a sentence of 3½ years in the custody of the Attorney General was imposed.

QUESTIONS PRESENTED

QUESTION I

Did Not the Trial Court Err in Refusing Petitioner's Motion for Judgment of Acquittal on the Grounds of Failure to Prove Material Allegations of the Indictment and Because of the Insufficiencies of the Evidence to Sustain a Conviction?

QUESTION II

Did Not the Trial Judge Err in Failing to Grant a New Trial Upon the Grounds of the Prejudicial Argument to the Jury by the District Attorney?

QUESTION III

Did Not the Trial Judge Erroneously Charge the Jury to the Prejudice of the Petitioner?

STATEMENT OF FACTS

The indictment in this cause returned in the United States District Court for the Western District of South Carolina (Spartanburg Division) charged the Petitioner with violation of Section 2312 Title 18, U.S.C. "Transportation of Stolen Vehicles".

The testimony at the trial disclosed that on or about November 30, 1957, Carl Faye Clary and Claude Lewis Solesbee were engaged in the used car business in the City of Spartanburg, South Carolina; that on or about November 30, 1957, Claude Lewis Solesbee received a

telephone call from Allen Frank Kayfield in the City of Spartanburg, South Carolina, and as a result thereof he and his companion in business, Carl Faye Clary, went to an eating place, known as "Simple Simon" in the City of Spartanburg, South Carolina, where they found Allen Frank Kayfield inside of the Simple Simon. (Rec. Vol. II, P. 41). A discussion then followed with reference to the sale of two automobiles, in which Kayfield, Borda, Solesbee, and Clary engaged. It later appeared that one of the automobiles had evidently been stolen. After the discussion between the four, Solesbee agreed to purchase two automobiles from Kayfield for a sum of $1,500.00 which he stated on the witness stand were worth in excess of $3,000.00. Solesbee and Clary both testified that insofar as they saw, the purchase price for the cars was paid by Solesbee to Kaysfield and that Borda received no part thereof. (Rec. Vol. II, Pages 46, 80). There is some discussion in the Record with reference to $300.00, but it is admitted by all parties concerned that this was an amount due Kayfield by Solesbee. (Rec. Vol. II, P. 80). Both Solesbee and Clary testified that they had never seen the Petitioner, Borda, before this meeting in Spartanburg. (Rec. Vol. II, Pages 43, 78). There is an absolute lack of testimony from any witness on behalf of the Government to connect Borda with the theft of the automobile in question, the transportation thereof, or aiding and abetting therein, or with any knowledge that the automobile in question had been stolen. In fact, there is no evidence to show that Borda even knew of the existence of the car in question until the meeting with Solesbee, Clary, and Kayfield at the Simple Simon, all of which will more fully appear by the Record and the Appendix herein.

The Petitioner made a Motion for Judgment of Acquittal, as will more fully appear by reference to the Record. (Rec. Vol. II, pages 90, 93).

The Petitioner was convicted as charged in the indictment and after timely Motions for a Judgment of Acquittal, or in the Alternative for a New Trial, the Presiding Judge overruled the same, whereupon he sentenced the Petitioner to serve 3½ years.

REASONS FOR GRANTING WRIT

QUESTION I

Did Not the Trial Court Err in Refusing Petitioner's Motion for Judgment of Acquittal on the Grounds of Failure to Prove Material Allegations of the Indictment and Because of the Insufficiencies of the Evidence to Sustain a Conviction?

Section 2312, Title 18 U.S.C., the one under which the Petitioner, Frank Borda, was indicted, provides:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

No authority need be cited that this, being a criminal statute, must be strictly construed.

Section 2, Title 18 U.S.C., provides, as follows:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

It is the position of the Petitioner, Frank Borda, that even the most casual analysis of the evidence and testimony in this case clearly shows that there was in-

sufficient evidence to sustain a conviction and that therefore the Trial Judge erred in refusing Petitioner's Motion for Judgment of Acquittal and submitting the case to the jury.

In considering the insufficiency of the evidence particular attention is called to the failure of the government to establish that the Petitioner, Borda, actually transported the stolen Ford Station Wagon, or that he in any way aided or abetted its transportation, that he had at any time any knowledge of the fact that it was stolen, or that he was at any time in possession of the vehicle. Each of these material elements of the offense will be discussed separately for the purpose of clarity.

First of all, the government at no time contended that the Petitioner, Borda, had any part in the actual theft of the Ford Station Wagon. The record is void of any testimony or evidence that the Petitioner, Borda, had any actual knowledge that the automobile was stolen. There is no testimony that the Petitioner, Borda, ever drove the stolen automobile, or that he had ever ridden in its prior to the time that the automobile was in Spartanburg, South Carolina. There is no testimony that the Petitioner, Borda, came to Spartanburg in the company of Allen Frank Kayfield, that they had come here together or at the same time, or in any sort of joint undertaking. There is no testimony that the Petitioner, Borda, came here from Philadelphia, as Mr. Kayfield was said to have done. There is no evidence that the Petitioner, Borda, even knew of the existence of the Ford Station Wagon until the day at Simple Simon in Spartanburg, South Carolina. There is no testimony or evidence that there was any prearrangement or plan between the Petitioner, Borda, and anyone else involved, and no participation in aid-

ing and abetting in the transportation by the Petitioner, Borda, with anyone else involved. On the other hand, the government's own witnesses' testimony only shows that Kayfield, Solesbee, and Clary were part of any pre-arrangements or were the only participants in transportation or aiding and abetting in transporting. It is thus seen that the government failed to establishment the element of transporting or the abetting of such transporting. Nor can the government claim that this vital element of the offense can be supplied by an inference or assumption drawn from any guilty knowledge on the part of the Petitioner, Borda, that the automobile had been stolen.

There is no sufficient evidence in the record to charge the Petitioner, Borda, with knowledge of the fact that the Ford Station Wagon had been stolen.

It has been held in *Camilla* v. *United States* (C.A. 6 Ky. 1953), 207 F. (2d) 339, that where a defendant's fingerprints appeared on a car identified as stolen and transported in interstate commerce, and defendant admitted to having been in the company of his co-defendant on many occasions, there was no proof or evidence from which inferences could be drawn that the defendant knew that the automobile had been stolen. It was there held that the fact that defendant had been in the car sometime after it had been stolen, as had other people, and the further fact that defendant was also in the company of the co-defendant at various times during the same period, were not inconsistent with the defendant's innocence, since these facts showed nothing more than association with one guilty of a crime.

The only testimony linking the Petitioner, Borda, in any manner with the transaction between Kayfield and

Solesbee and Clary is the fact that he was present when the sale of the automobile was consummated and that he offered his comments concerning the price which Solesbee and Clary offered to pay for the automobile. However, it is the Petitioner's position in this case that even if guilty knowledge concerning the stolen automobile were imputed to Borda for the sake of argument, such knowledge is immaterial and irrelevant to conviction under this Section, unless coupled with some evidence that Borda transported the automobile or aided or abetted Mr. Kayfield in its transportation. The mere fact of guilty knowledge existing subsequent to the offense is insufficient to convict the Petitioner and shows, at the very most, nothing more than an association with one who is guilty of a crime.

That a person has knowledge that an automobile was stolen, which is denied in this case, is insufficient to convict him of any offense. It should be particularly noted, however, that even if Borda's comment concerning the price of the automobile could be held to establish knowledge of the theft of the car, such knowledge is not shown to have existed while the automobile was being transported in interstate commerce, but only afterwards at the Simple Simon in Spartanburg, South Carolina. An individual cannot be convicted of aiding and abetting an offense of which he had no knowledge until after it was complete. *Rizzo* v. *United States*, (C.C.A. Pa. 1921), 275 F. 51. This case overcomes any inference of aiding and abetting transportation which might arise from Petitioner having participated in any conversation about the price of the automobile. Then, if the government has failed to prove transportation, and has failed to prove that the Petitioner had any knowledge of the theft of the automobile, at least until

after the transportation, can the government supply this insufficiency of proof by resort to an inference arising from the possession by the Petitioner of the automobile shortly after it was stolen? Perhaps the government might urge such a proposition if it were a fact that the government had established possession by the Petitioner at any time.

The government did not offer sufficient testimony to establish that the Petitioner had possession of the automobile in question. The only attempt by the government to show anything like possession was the testimony of Clary and Solesbee that the Petitioner sat in the back of the automobile for a very few minutes, during a conversation between Kayfield, Solesbee, and Clary concerning the purchase and sale of the automobile. Of course, the government claims that Borda also commented upon this conversation, but that has no bearing whatsoever on possession. It has been held that the mere sitting in a vehicle is not sufficient evidence of possession. *United States* v. *O'Brien*, (7 Cir.), 174 F. (2) 341. Otherwise, under the government's theory, an equally strong case for possession could have been made against any person who may have associated with Mr. Kayfield, Clary, and Solesbee, or had sat in the car or been present at the time sale was consummated. In fact, under such a rule, any acquaintance of Mr. Kayfield, Solesbee, or Clary, who had been seen riding with either of them in the car could, for this reason alone, have been found guilty of the crime charged.

Possession connotes domination or a power or intent to control property and to exclude other persons from the exercise of authority over the property. It has not been shown that the Petitioner even had "custody" of

the automobile, and even custody is not tantamount to possession. In *Barfield* v. *United States*, 229 F. (2d) 936, it was held that much more must be shown than even the driving of a vehicle to establish the essential characteristics of possession. There was no effort on the part of the government to show even a momentary or apparent custody or control of the automobile in question. In this connection it has been held that the deficiency in proof of possession cannot be remedied on the theory that the Petitioner acquired a "possession" from aiding and abetting someone else's possession. *Johnson* v. *United States*, (8 Cir.), 195 F. (2d) 673. The *Johnson* case held that to be aiding and abetting possession, it must be knowing it to have been stolen. And assistance, assuming that to be so, cannot be turned into a vicarious possession to prove that as a fact on which to base the subsequent inference of knowledge.

The government presented no direct evidence to prove the offense against the Petitioner. The case was submitted to the jury upon a conglomeration of inferences, without directly proving any of the facts in issue. Certainly the testimony did not measure up to the requirements of circumstantial evidence in a criminal case. The rules as to circumstantial evidence are thus stated in I *Starkie on Evidence*, 570-574: "I. The circumstances from which the conclusion is drawn should be fully established. II. All the facts should be consistent with the hypothesis. III. The circumstances should be of a conclusive nature and tendency. IV. The circumstances should to a moral certainty actually exclude every hypothesis but the one proposed to be proved." These rules are approved in *State* v. *Aughtry* (1896), 26 S.E. 619; 49 S.C. 285. See also *State* v. *Hudson* (1903), 44 S.E. 968; 66 S.C. 394.

Of course, every circumstance must be proved beyond a reasonable doubt, and all of the circumstances proved must be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one; and if, assuming them to be true, they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed. *State* v. *Kimbrell*, 4 S.E. (2d) 121; 191 S.C. 238. *State* v. *Brown*, 32 S.E. (2d) 825; 205 S.C. 514.

The circumstantial evidence presented by the government was insufficient by any standard to be submitted to the jury. Numerous hypothesis of innocense can be easily drawn from the testimony in the case. For example: Does the evidence exclude the hypothesis that Borda was a resident of Spartanburg, South Carolina; that he met Kayfield only a few hours before the meeting at Simple Simon with Solesbee and Clary; that Kayfield had, perhaps, talked to Borda about going back north with him and working with him, and that Borda had agreed to go? The testimony permits endless variations of this hypothesis.

It appears to the Petitioner that the government has proved its case in some such manner as the following: The element of transporting or the aiding or abetting of transporting is established from an inference from guilty knowledge on the part of the Petitioner concerning the theft of the car, which guilty knowledge is established from an inference drawn from the possession of the recently stolen automobile, which possession is established from an inference drawn from the fact

that the Petitioner sat in the back seat of the car in Spartanburg for a few minutes.

This, of course, violates the rule that where circumstantial evidence is relied on, the circumstances must themselves be proved and must not be presumed or rest in conjecture. *McCready* v. *Atlantic Coast Line Railroad Company*, 48 S.E. (2d) 193, 196; 212 S.C. 449. 32 C.J.S., Evidence, Sec. 1039, Pages 1099, *et seq.*

The Trial Judge was in error in allowing such testimony to go to the jury and in allowing the jury to bolster the weaknesses in the government's case by the application of any sort of presumption or inference to be drawn from the unexplained possession of a stolen vehicle. Certainly, possession by the Petitioner was never established by the government and the government should not have been allowed the aid of such a presumption in convicting the Petitioner. It seems very clear that this presumption or inference drawn from unexplained possession was the main theory upon which the Trial Judge submitted the case to the jury.

The following cases involving prosecutions under 18 U.S.C. 2312 (Transportation of Stolen Vehicles) illustrate that the courts will not approve convictions based on conjecture, suspicion and speculation as indulged in this case.

Camilla v. *U.S.*, 207 F. (2d) 339;
Johnson v. *U. S.*, 195 F. (2d) 673;
U. S. v. *Gardner*, 171 F. (2d) 753;
U. S. v. *Golden*, 166 F. Supp. 799;
Cox v. *U. S.*, 96 F. (2d) 41;
McCloud v. *U. S.*, 75 F. (2d) 576;
Abraham v. *U. S.*, 15 F. (2d) 911.

In the case of *Aikens, et al* v. *U. S.*, 98 U.S. App. D.C. 66, 232 F. (2d) 66, the Court held as to Appellant

Kingsbury that his mere association with Aikens and others found guilty is not sufficient to support his (Kingsbury's) conviction.

The cases of *U. S.* v. *Stromberg, et al* (2nd Cir.) 268 F. (2d) 256, and *Davis, et al* v. *U. S.*, 274 F. (2d) 585, 107 U.S. App. D.C. 76, also demonstrate the deficiency of the evidence against this Petitioner.

The Trial Judge did err in refusing Petitioner's Motion for Judgment of Acquittal on the grounds of failure to prove material allegations of the indictment and insufficient evidence to sustain a conviction.

QUESTION II

Did Not the Trial Judge Err in Failing to Grant a New Trial Upon the Grounds of the Prejudicial Argument to the Jury by the District Attorney?

The Petitioner contends that his rights to a fair and impartial trial were prejudiced by the United States Attorney in his argument, as a whole, and in the following particulars:

(1) Prejudicial error in his comments, indirectly, that the Petitioner did not testify.

(2) Prejudicial error in his appeal to passion and prejudice.

The duties and standards of conduct of United States Attorneys and Trial Judges, and authorities related thereto, came in for an exhaustive review by the United States Court of Appeals for the Fourth Circuit in the Opinion recently handed down in the case of *Wallace* v. *U. S.*, 281 F. (2d) 656, and while extensive research was conducted in the case at hand and some additional authority noted, the *Wallace* case contains ample authority for the views expressed herein.

In his opening argument to the jury (Rec. Vol. II, Page 26), the United States Attorney Hines commented indirectly on the fact that Petitioner had not taken the stand or testified.

> "Mr. Hines: If you forget every other thing I am telling you or will tell you, remember this: Mr. Borda went to Mr. Dever's room this morning in the hotel and here's what he said as I put it down. * * * But as I recall, here was what he said: he said that Mr. Borda told him to say that 'I gave'—that's Mr. Dever—'That I, Mr. Dever, gave Kayfield permission to take the car.' That hasn't been denied. * * *"

On direct examination, the United States Atttorney brought forth this information:

> "Mr. Hines: Who was present in your room this morning when he (Borda) came in there?
> Mr. Dever: A. My Wife."

With only the witness Dever, his wife, and the Petitioner, Borda, present, who was the only person to deny the statement—the Petitioner, Borda, if he had chosen to take the stand and testify. It cannot be assumed that the wife of witness Dever would have contradicted her husband.

In a case in which reversible error was noted because of comment on failure to deny or contradict testimony where defendants did not take the stand, the Court had this to say:

> "Everyone accused of crime is presumed to be innocent until proven guilty. During the period of that presumption, one so accused may combat the evidence brought against him; or he may, if he choose, meet it in silence. That is his right. For its protection the law imposes corresponding

silence upon prosecutor and court. Neither can validly refer or indirectly call attention to his failure to speak in his own defense. Being innocent in the eyes of the law, he is not called upon to meet accusing testimony by contradiction or explanation. Therefore, no presumption can lawfully be raised or comment lawfully be made upon his failure to do that which the law expressly says he shall not be required to do.

"The apprehension and arrest occurred at night, out in a stream. The only persons present were the three defendants and the two customs officers. The latter were witnesses for the prosecution. It follows, therefore, that the only persons who could possibly contradict their testimony were the defendants themselves." *Linden, et al v. United States* (C.C.A. 3rd, N.J., 1924), 296 Fed: 104.

"And, *except in those special cases where it appears that the accused himself is the only one who could possibly contradict the government's testimony*, ... the prosecutor may properly call attention to the fact that the testimony of the government witnesses has not been contradicted." (Emphasis added.) *Langford v. United States* (C.C.A. 9th, California, 1949), 178 F. (2d) 48.

The United States District Attorney aroused local passion and prejudice in his argument. (Rec. Vol. II, Pg. 26).

"Mr. Hines: * * * Now, Mr. Clary and Mr. Solesbee are our local people; both of them got on the stand and they told you exactly how it is, or how it was. * * *" (Rec. Vol. II, Pg. 26)

"Mr. Hines: * * * What was Borda down here for? What was he down here for? What was he down in our community for? You can look at him. He's got no business down here like that. But Kayfield. . . . * * *

"Mr. Watt: Your Honor, I don't think the District Attorney has the right to make that statement.

"Mr. Hines: You are right, I apologize.

"The Court: He says he withdraws that.

"Mr. Hines: Don't forget this one fact: Kayfield is from up there too."

In referring to the government's witness as "our local people" and to the Petitioner as not having any business being down in our community from "up there" the United States Attorney appealed to passion and prejudice which might have existed.

This error was not corrected by the Court in saying "He says he withdraws that." (Rec. Vol. II, Pg. 29).

At conclusion of United States Attorney's closing argument (Rec. Vol. II, Pg. 29):

"Mr. Hines: Is that what Borda is doing now? Borda says. 'No, sir, I was down here; I didn't have anything to do with; just down here for the buggy ride." * * *

"Is that an innocent man? Is he down here in our community with two cars—one a stolen car, a Ford stolen car. And he had nothing to do with it? Are you all going to swallow that kind of stuff? Personally, I don't think you will."

The Petitioner had not testified and had made no such statements attributed to him.

By unfairly injecting into the argument facts and statements not in the record, imposing upon the jury his personal opinion as to what the jury "will swallow", (Rec. Vol. II, Pg. 29) the United States Attorney is violating his impartial position as a quasi-judicial officer, in seeking to have the jurors draw unfavor-

able inferences as to the character of the Petitioner, Borda, which hasn't been placed in issue.

In one of a number of cases where the reversal resulted in part from the the probable impact upon the minds of the jurors of an improper argument by the District Attorney, the Court says:

> "A United States District Attorney carries a double burden. He owes an obligation to the government, just as an attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer. In this case zeal outran fairness. The argument of the United States Attorney in the district court was improper, prejudicial, and constituted reversible error.
>
> "The Court's conclusion is directly related to the indecisiveness of the evidence supporting the verdict. In a close case, appeals to prejudice take on added weight. When the scales of justice may tip either way and a man's liberty lies in the balance, courts must be especially vigilant to protect an accused. It is necessary therefore to take a long, hard look at the record." *Handford* v. *United States* (C.A. 5, 1957), 249 Fed. (2d) 205, 296.

There as here the objectional argument was upon extraneous matters of a prejudicial nature.

Such improper actions of the prosecution have been condemned by this Court in *Grunewald, et al* v. *U. S.*, 353 U.S. 391. 1 L. Ed. 2d. 931, 77 S. Ct. 963; *Viereck* v.

U. S. 318 U.S. 236, 87 L. Ed. 734; *U S.* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 84 L. Ed. 1129; *Berger* v. *U. S.*, 295 U.S. 78, 79 L. Ed 1314 and *Wilson* v. *U. S.*, 149 U.S. 60, 37 L. Ed. 650

The Trial Judge did err in failing to grant a new trial upon the grounds of the Argument of the District Attorney being prejudicial to the right of the Petitioner. This action denied to the Petitioner the fair trial guaranteed under U. S. Constitution (5th and 14th Amendments).

QUESTION III

Did Not the Trial Judge Erroneously Charge the Jury to the Prejudice of the Petitioner?

It will be noted from a review of the Trial Court's Charge (Rec. Vol. II, p. 108) that undue emphasis was placed upon one particular element of the offense charged, that of transportation or the aiding and abetting of transportation. This emphasis misled the jury and caused it to discount the necessity of also finding that the Petitioner had knowledge that the automobile had been stolen. Taken word for word the Charge may have been technically correct, but taken as a whole and in connection with the highly prejudicial argument of the United States Attorney, the over-all result was to lead the jury to assume that the Petitioner's guilty knowledge had been established as a matter of law and that the only remaining issue to be decided by the jury was whether or not the Petitioner had in fact transported the stolen automobile or had aided in its transportation. When considered with the Government's argument, the instruction was not clear to the jury, that the mere fact of transportation, if established, was not a viola-

tion of the Statute without a further showing that Petitioner knew the automobile was stolen. Especially is this so, when taken with that portion of the Charge to the effect that knowledge through possession of recently stolen automobile is a presumption of law, shifting the burden of proof as to innocence onto the Petitioner. See *United States* v. *Rabb*, (Ill. 7th 1949), 177 F. (2d) 312; *Barfield* v. *United States*, (Ill. 5th, 1956), 229 F. (2d) 936.

It is felt that portions of the Trial Court's Charge constitute plain or prejudicial error and could be noticed by that Court (4th Cir.) under its own Rule 10(8) and under Rule 52 (b), Federal Rules of Criminal Procedure, especially where such notice is necessary to protect the life or liberty of a defendant.

At Rec. Vol. II, p. 109, the Trial Court committed error in its explanation of aiding and abetting by omitting any reference to knowledge.

> "The Court: Now, abet means to incite * * * that's what those terms mean. It means simply that if Borda, the Defendant in this case, aided, abetted, or helped, encourage, and countenanced this man in any particular in transporting this automobile, that he would be just as guilty as if he transported the automobile himself."

It is noted that the Trial Court refers to one who aids and abets as a "principal", whereas the Statute, Section 2, Title 18, U.S.C., now reads "is punishable as a 'principal' ".

At Rec. Vol. II, p. 110, the same error as mentioned above is again noted.

At the close of the Trial Court's Charge, at Rec. Vol. II, Pages 113-114, the last impression on the minds of the jurors was as follows:

> "The Court: After all, it resolves itself to a simple—applying the presumption of law of recently—possession of recently stolen automobile together with all the other law I have given you, after all is said and done, did the defendant here transport or aid and abet or help or assist in having that car brought from New Jersey to South Carolina? That's the only question. If he did, he's guilty; if he did not, he is not guilty."

The question of knowledge has previously been discussed in more detail under the question of insufficiency of the evidence.

We submit that the omission of knowledge in portions of the Trial Court's Charge, as an element of the offense was error and that the error was not cured or overcome by other portions of the charge. Section 2312, Title 18, is clear as to the elements of the offense and numerous decisions and authorities could be cited pointing out that all elements must be proved by the Government before a conviction can be sustained.

The deficiency of the Trial Court's Charge on the subject matter of knowledge is to be demonstrated by a consideration of the decision of this Court in *Screws* v. *U. S.*, 325 U.S. 91, 107, 89 L. Ed. 1495, 1505.

In the case of *Barry* v. *U. S.*, U.S.App.D.C. Nos. 15,763-15,765, January 12, 1961, the Court in reversing a conviction, discussing the aspect of "knowledge", stated as follows:

> "Failure to guide the jury in this respect may well have caused them to omit consideration of this branch of the case. We are not in a position to say,

in other words, that the verdict indicates that the jury found the evidence, bearing upon knowledge, established this essential element of the crime."

Petitioner would point out that to prevent injustice, in criminal cases, this Court has corrected fundamental errors even though the question or questions have not been properly saved.

See:

Wiborg v. *United States*, 163 U.S. 632, 41 L. Ed. 289, 16 S. Ct. 1127, 1197;
Crawford v. *United States*, 212 U.S. 183, 53 L. Ed. 465, 29 S. Ct. 260, 15 Ann. Cas. 392;
Burns v. *United States*, 274 U.S. 328, 71 L. Ed. 1077, 47 S. Ct. 650;
Berger v. *United States*, 295 U.S. 78, 79 L. Ed. 1314;
Screws v. *U. S.*, 325 U.S. 91, 89 L. Ed. 1495, 1505.

It is respectfully submitted that the errors urged in this Petition are basic and important.

There is, as to the questions presented, conflict between the United States Court of Appeals for the Fourth Circuit and the other Courts of the United States Circuits, and as well the pronouncements of this Honorable Court.

CONCLUSION

For the reasons above set forth, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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3 February 1961